IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-57

CANADIAN ACE BREWING CO.,
Petitioner,

vs.

ANHEUSER-BUSCH, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Respondent's brief in opposition, emphasizes the need for this Court to review this federal antitrust suit.

Respondent did not take issue with Petitioner's contentions that:

(1) The federal antitrust laws are the economic bulwark of a democratic society (Pet., p. 9);

(2) Congress was impelled to pass the Sherman Act because it was concerned with the growing concentration of economic power in the hands of the few, and the rapidly diminishing freedoms of economic opportunity for the small businessman (*Id.*, p. 9);

(3) There were 756 breweries in 1934, and currently there are only 43 breweries (*Id.*, p. 9).

Thus, Respondent's admitted acts of fraudulent conduct, in the context of this important federal economic policy, in our democratic society, are especially unconscionable.

RESPONDENT'S ARGUMENTS AND PETITIONER'S REPLIES

Argument No. 1

Respondent argues:

> On appeal, Petitioner for the first time contended that "equitable estoppel," rather than "fraudulent concealment," provided the basis for avoiding the capacity bar of the Illinois statute. (Brf., p. 4.)

Reply: Respondent's statement has no legal significance. It is the "fraudulent concealment" which creates an "equitable estoppel." Pomeroy's Equity Jurisdiction, Fifth Edition (Symons), Vol. III (1941), § 808, p. 206. Thus, Respondent's contention that there is a legal distinction between "equitable estoppel" and "fraudulent concealment" is without merit.

Argument No. 2

Respondent argues:

> Petitioner reasserted its "equitable estoppel" argument on petition for rehearing in banc. In answer to the petition, Respondent argued that the alleged estoppel issue was not properly before the Court because of Petitioner's failure to raise it in the District Court; that even if not untimely, Petitioner had failed to plead an equitable estoppel. (Brf., p. 4.)

Reply: (a) Respondent's statement that Petitioner failed to raise the alleged estoppel issue in the District Court belies the record. In Petitioner's answering memorandum, to Respondent's memorandum, in support of its motion to dismiss, at the trial court level, Petitioner argued "that no man may take advantage of his own wrong." *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, 3 L. Ed. 2d 770 (1959).

(b) Respondent's statement that "Petitioner had failed to plead an equitable estoppel" is baseless. Paragraph 18(i) of the complaint is addressed to Respondent's acts of "Fraudulent Concealment"; paragraph 18(iii) is addressed to Respondent's acts of "Affirmative Fraudulent Misrepresentation"; and paragraph 18(vi) is addressed to Respondent's acts of "Fraudulent Inducement." In paragraph 22(a)(b)(c) (Relief Requested), Petitioner pleaded that the court preclude Respondent from pleading § 94 of the Illinois Business Corporation Act, Ill. Rev. Stat. ch. 32, § 157.94 (hereinafter "§ 94").

Argument No. 3

Respondent cites numerous cases for the general rule of law, that after the expiration of the two-year period from the date of its dissolution, a dissolved corporation is foreclosed from initiating any legal proceedings. (Brf., pp. 5-7.)

Reply: Petitioner agrees with this general rule of law. However, in none of the cases cited by Respondent was it necessary to consider, nor did the parties urge, the existence of any facts suggesting the need to apply the doctrine of equitable estoppel. Because of Respondent's admitted* acts of fraudulent conduct, the District and Circuit Courts erred in failing to "preclude" Respondent from asserting its rights, under § 94, against Petitioner. *Pomeroy, supra,* § 804, p. 189. Respondent should not be permitted to frustrate and evade the federal antitrust laws, which are designed to prevent the concentration of economic power in the hands of the few.

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* In its footnote on page 3, Respondent agrees that its motion to dismiss, admits as true, Petitioner's allegations of Respondent's fraudulent conduct, and then proceeds to deny them. Respondent cannot have it both ways. At this stage of the litigation, Respondent's denial is of no consequence, and cannot contradict the effect of its motion to dismiss.

Argument No. 4

Respondent argues:

> Furthermore, there is no conflict between the decision below and the decisions in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), and *Bomba* v. *W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978), on which Petitioner relies. Neither of those cases involved the capacity of a dissolved corporation. In each case, the issue was whether equitable estoppel could apply (based on factual allegations far different than those involved here) with respect to a so-called "substantive" statutes of limitations. (Brf., p. 6.)

Reply: Originally the doctrine of equitable estoppel was only applied to "traditional" statutes of limitations, but not to "substantive" statutes of limitations (those statutes creating a new cause of action unknown to the common law, and limiting time for commencing suit thereon). In *Glus*, this court followed the ruling of many circuits, and declared that equitable estoppel shall apply to "substantive" statutes of limitations. In *Sarelas* v. *McCue & Co.*, 291 Ill. App. 540, 10 N. E. 2d 700, 702, the court characterized a statute of "survival," as a "conditional limitation" statute. The distinction drawn by the District and Circuit Courts, between time limitations set forth in "traditional" statutes of limitation and those contained in "survival" statutes, is no more meaningful than the now rejected distinction between "procedural" and "substantive" statutes. *Glus*, should be controlling in every instance where "the maxim that no man may take advantage of his own wrong," is applicable. Thus, equitable estoppel, should not only apply to "traditional" and "substantive" statutes of limitations, but also to a "conditional limitation" or "survival" statute.

Argument No. 5

Respondent argues:

> Even if § 94 were a statute of limitations, which it is not, *People* v. *Parker, supra*, 197 N.E.2d at 31, *Glus* and *Bomba* would be inapplicable here because in neither case was the court required to harmonize the application of an estoppel with the purposes underlying a corporate survival statute like § 94. (Brf., pp. 6-7.)

Reply: Respondent contends that the language of § 94 is absolute and unequivocal, and thus, the Court is foreclosed from applying the separate and distinct doctrine of equitable estoppel. The District and Circuit Courts agreed. This Court in *Glus*, and the Circuit Court in *Bomba*, ruled that although the statute involved was absolute and unequivocal, it did not foreclose the application of the separate and distinct doctrine of equitable estoppel. Thus, the District and Circuit Courts erred in refusing to apply the separate and distinct doctrine of equitable estoppel to § 94, in accordance with this Court's ruling in *Glus*, and the Circuit Court's ruling in *Bomba*.

Argument No. 6

Respondent argues:

> that corporate survival statutes are based on the need for a "definite point in time at which the existence of a corporation and the transaction of its business are terminated."
>
> * * * * *
>
> Neither in its Petition nor at any other point in this litigation has Petitioner even attempted to reconcile its proposed construction of § 94 with this statutory purpose. The reason, quite clearly, is that no such reconciliation is possible. (Brf., p. 7.)

Reply: Respondent contends that when attempting to "reconcile" § 94, with the doctrine of equitable estoppel, in this antitrust suit, § 94 must prevail. This contention is incredible. It is

frivolous for Respondent to contend that the purposes of § 94 could be paramount to "justice and good conscience." (*Glus.*) On the contrary, the courts have ruled that "justice and good conscience" will "preclude" a party "from asserting rights" which might otherwise exist, "either of property, of contract, or of remedy." (*Pomeroy, supra,* § 804, p. 189.)

Respondent's admitted acts of fraudulent conduct in order to (1) "suppress commercial competition," (2) "fix prices," (3) "restrict production," and (4) "crush small independent traders," (Pet. p. 9), should not be sanctioned by the federal courts; and the doctrine of equitable estoppel should be applicable to § 94.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, Canadian Ace Brewing Co. respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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